Association of European Administrative Judges (AEAJ)

Statement on Access to Administrative Justice in Environmental Matters – A Comment on the Milieu Study issued by the European Commission –

following the workshop of the Working Group on Environmental Law held in Brussels on the 14th of March 2008

Updated 31th of May

I. Introduction

During the workshop the AEAJ Working Group discussed the transposition of the third pillar of the *Aarhus Convention* into national law and ventured to assess the so-called "Milieu Study" issued by the European Commission. The following Member States had sent delegates: Austria, Finland, France, Germany, Greece, Hungary, Italy and Poland.

Each delegate presented a case on environmental law from his/her home jurisdiction. The presentation was followed by a discussion whereby the other members commented on the case and offered a solution according to their national laws[1]. It turned out that, although all the Member States have so far transformed the *Aarhus Convention* into national law a considerable amount of actions were deemed inadmissible under national law.

Each delegate then issued a statement on his/her national report and the conclusions arrived at by the authors of the Milieu Study. According to the Working Group the national reports in Milieu Study more or less accurately describe the general structures of administrative jurisdiction in the Member States. The Working Group agreed with the findings by the Milieu Study that national rules indeed widely differ from Member State to Member State. Some of the Member States, Austria and

[1] The cases and solutions are published on the AEAJ's website www.aeaj.org

Germany in particular, have set up restrictions to access to administrative justice in environmental matters which in turn create problems without parallel in other Member States. The Working Group criticised the state of affairs as to the scope of judicial review in some Member States. According to the Working Group access to justice is not worth its name if, for example, the court is limited to a control of procedural aspects only. The Working Group raised concerns as to the effectiveness of judicial remedies. Article 9 para. 4 of the *Aarhus Convention* demands (…) timely and not prohibitively expensive procedures. According to the Working Group effectiveness depends on other factors too. The Working Group regards the different deep-rooted judicial traditions as the crucial problem on the way to common standards for the application of the third pillar of the *Aarhus Convention*. The Working Group stressed the need for more interaction between the representatives of the different legal systems. According to the Working Group it is essential for the judges within the administrative judiciary to have a certain knowledge of the functioning of other legal systems in order to be able to critically evaluate the situation at home. The Working Group concluded that the access to administrative justice in environmental matters granted so far does not always correspond to spirit of the *Aarhus Convention* and that the respective Codes of Judicial Procedure in the respective Member States are in need of amendment.

II. Comments on the National Reports in the Milieu Study

1. Austria

The study accurately describes the current legal situation. According to the delegate a proper implementation of Article 9 para. 3 of the *Aarhus Convention* is only to be expected if the Commission takes up the initiative and proposes a directive.

2. Finland

The study more or less accurately describes the current legal situation. However, the conclusions and parts of the assessment could have been a bit more extensive, some arguments could be challenged, for example the significance of the complaint procedure. Furthermore, some parts of the text are only half-finished.

3. France

The French government issued two reports, in January 2005 and December 2007, on the application of the Aarhus Convention. These reports give a best analysis available of the application in France.

4. Germany

The study more or less accurately describes the current legal situation. However, the study does not give a complete account of the current legislative situation, which has already been criticized by the German government. But these deficiencies are of minor importance since they rather concern details of German law. According to the delegate the current legal provisions must be regarded as insufficient. A general and less restrictive regulation is advisable under the spirit of the Aarhus Convention. The delegate voiced doubts if the new "Umweltrechtsbehelfsgesetz" complies with the Aarhus Convention and the Directive 2003/35/EC.

5. Hungary

The National Report on the situation in Hungary was drafted by an NGO. The problems mentioned in the conclusions mainly concern the lack of either funding or human resources, i.e. experts. The Working Group pointed out that this type of problems cannot be solved by legal means.

6. Italy

The study more or less accurately describes the current legal situation. However, the study does not give a complete account of the current legislative situation und practical problems are not addressed enough.

7. Poland

The study accurately describes the current legal situation. According to the delegate only some conclusions of minor importance seem to be questionable.

III. Proposal for a Directive of the European Parliament and the Council on Access to Justice in Environmental Matters COM (2003) 624 final

The Aarhus Convention is not regarded as self-executing. The Aarhus Convention allows for more detailed regulation. The Working Group therefore principally supports the Proposal in order to establish common European standards. However, it is questionable if the Proposal goes any further than the Aarhus Convention itself The Proposal could simply be seen as a binding variation of Article 9 of the Aarhus Convention. It does not seem necessary to differentiate between "members of the public" and "qualified entities" (see Article 4 and 5 of the Proposal). The Preamble of the Aarhus Convention demands that effective judicial remedies be accessible to the public, "*including organisations*". The term "qualified entities" could lead to a restrictive interpretation of the Aarhus Convention in the sense that only approved associations must have access to justice. The Working Group is of the opinion that Article 6 of the Proposal should foresee exceptions, if the initial administrative procedure includes a thorough investigation, participation of stakeholders and a public hearing like e.g. the German "Planfeststellungsverfahren". In these cases a request for internal review would lengthen the procedure and present an obstacle for judicial remedies.

IV. Recommendation on Best Practice

The AEAJ Working Group like judges' organisations in general does not feel constricted to evaluate existing rules. The Working Group does not solely focus on the compliance of national law with European Law or International Public Law. The following recommendations on best practice shall be more than correct interpretation of higher range law and more than the lowest common denominator. But of course judicial traditions must be respected as much as possible.

1. Notion of "Environmental Matters"

For reasons of legal certainty it is recommended to make use of the enumerative method. The law on urbanism should be included in the catalogue of environmental matters.

2. Legal standing of NGOs

It is regarded as indispensable for the enforcement of environmental law that NGOs have legal standing before the courts. However, it seems not advisable to grant access to associations which have not been approved since these groups tend to defend individual interests of their members only.

3. Legal standing of public self government bodies

In some Member States legal standing is granted to self government bodies. However, it does not seem vitally essential for the enforcement of environmental law.

4. Public attorney in Environmental Matters

The institution of an "ombudsman" is not a necessary feature where the rules on legal standing are liberal. The opposite holds true if the rules on legal standing are restricted. If the ombudsman is truly independent he/she can contribute to the enforcement of environmental law.

5. Suspensive Effect and Interim Relief

In some Member States the suspensive effect must be granted by the public authority or the court. In other Member States suspensive effect of an action is a general rule, subject to exceptions.

In any case, an effective system of interim relief must be installed. The procedure has to be easily available. It must be speedy, protect against irreversible damage. The courts should be prepared to order supensive effect in so-called *in-dubio-situations*.

6. Two judicial instances?

In the most Member States the judiciary comprises courts of first instance and courts of appeal. Although this is not regarded as essential, the Working Group recommends a second instance which may be limited to a review on the grounds of law, not facts, in order to assert the unity of the legal order.

7. Investigation in the Judicial Procedure

According to the legal tradition in some Member States (e.g. Hungary, Poland) the courts do not engage themselves in the investigation of the facts so that they will not quash a decision where the public authority has wrongly investigated the facts. These Member States rely on a request for internal review (see Article 6 of the Proposal). By majority of votes the Working Group is of the opinion that such a limitation of the grounds on the basis of which a decision can be quashed is not desirable in environmental matters since the investigation of the facts - at least in the first instance –may be more important than the interpretation of law.

8. Representation by a Lawyer

The issue of representation by a lawyer is connected with the burden of costs. In most of the member States the representation by a lawyer is obligatory before courts of second instance. This is regarded as a good practice.

9. Privilege for NGOs concerning Legal Aid?

The general rules seem to be sufficient.

10. Low Costs or Dispensation for NGOs?

In many Member States court fees are already quite low and therefore have no prohibitive effect on access to administrative justice. But if the fees are high and the "loser pays it all" principle is in place the financial risk can be a serious obstacle. The Working Group recommends a dispensation of court fees including costs of evidence for NGOs if they exceed a small lump sum.